DOCKET

PROCEEDINGS AND ORDERS DATE: 0107

CASE NBR 84-1-05389 CFH
SHORT TITLE Jacobs, Eligaah A. DOCKETED: Sep 7 198
VERSUS Wainwright, Sec., FL DOC

Date	Proceedings and Orders
Sep 7 1984	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Oct 11 1984	Brief of respondent Wainwright, Sec., FL DOC in opposition filed.
Oct 18 1984	DISTRIBUTED, November 2, 1984
Nov 5 1984	REDISTRIBUIED, November 9, 1984
Nov 13 1984	REDISTRIBUIED, November 21, 1984
Nov 26 1984	The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall, with whom Justice Brennan joins. (Detached opinion.)

PETITION FOR WRIT OF CERTIORARI

NO. 84-5389

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ELIGAAH ARDALLE JACOBS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,
Secretary, Department of Corrections,
State of Florida,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I

When, in a capital case, evidence of nonstatutory mitigating factors is excluded by the trial judge (after lengthy colloquy on the issue), in obvious violation of Lockett v. Ohio, 438 U.S. 536 (1978), and its progeny, and when after imposition of a death sentence, the accused's counsel (the same person who represented him at trial) wholly fails to raise the point on appeal,

(a) Whether, under the Eighth and Fourteenth Amendments to the United States Constitution, and consistent with Eddings v. Oklahoma, 455 U.S. 104 (1982), a violation of a principle as fundamental as the Lockett one can be ignored merely because counsel fails to make a "proffer" after the colloquy on the admissibility of the evidence, when no proffer has been requested, and the reviewing court has the power to consider the error whether or not a proffer has been made;

(b) Whether, under the Sixth Amendment to the United States Constitution, a defendant can be said not to have been denied the effective assistance of counsel on appeal when his counsel wholly fails to raise an issue on appeal, because he has additionally failed to take steps below which the appellate court feels were necessary for it to consider the issue which was never raised.

II

Whether, in a capital case in a state where aggravating factors are balanced against mitigating factors, and the trial court has sentenced the accused to death, due process and the Eighth Amendment to the Constitution require, where an aggravating factor has been invalidated on appeal, a remand for rebalancing when one or more statutory mitigating factors have been found against which the remaining aggravating factors must be balanced.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioner, Eligaah Ardalle Jacobs, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Florida in this case, rendered on June 14, 1984.

OPINION BELOW

The opinion of the Supreme Court of Florida is reported in Jacobs v. Wainwright, 450 So. 2d 200 (Fla. 1984), and is set out at pages 1 to 4 of the Appendix.* The order denying rehearing is set out at (A.13).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), to review the judgment and opinion of the

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* Citations to the Appendix accompanying this Petition are hereafter designated "(A.__)."

Supreme Court of Florida issued on February 23, 1984 and rendered on June 14, 1984, upon the denial of a timely petition for rehearing.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Sixth Amendment to the United States Constitution, which provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence;

the Eighth Amendment to the Constitution, which provides, in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution, which provides, in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . .

It also involves Fla. Stat. § 921.141 (1973), set out at (A.14-15).

STATEMENT OF THE CASE

A. Prior Proceedings

This Petition for Certiorari seeks review of the decision of the Florida Supreme Court, in an original proceeding brought in that court, seeking state habeas corpus in a capital case. Under Florida law, postconviction matters are heard by the court in which the bases for the postconviction relief took place. Because the claims at issue here related to the hearing and consideration of Petitioner's direct appeal, rather than his trial, they were raised in the Florida Supreme Court in the first instance.

Petitioner Jacobs was found guilty after a jury trial of two counts of murder in the first degree, by the Circui

Court of the Sixth Judicial Circuit, in and for Pasco County, Florida, on February 13, 1976. He was represented by assigned counsel, a private attorney in Pasco County. The sentencing phase of his trial, which was commenced immediately upon the completion of the guilt phase, was completed in a period of about 29 minutes (R. 935),* and on that day, Petitioner Jacobs was sentenced to death on each count.

In accordance with the Florida statute, a direct appeal was taken to the Florida Supreme Court, which affirmed the judgments of conviction, and the sentences of death, in Jacobs v. State, 396 So. 2d 1113 (Fla.), cert. denied, 454 U.S. 933 (1981).**

A few months after certiorari was denied by this Court with respect to the direct appeal, the undersigned counsel agreed to act for Petitioner, and commenced the instant state postconviction proceeding. Relief was denied by the Florida Supreme Court, by a 5-2 vote, in Jacobs v. Wainwright, 450 So. 2d 200 (Fla. 1984), the opinion below, on February 23, 1984, with the two dissenters stating that they would grant relief on the basis of the failure to raise the Lockett violation, the first question presented for review by this Court. Rehearing was denied on June 14, 1984, again by a 5-2 vote.

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* References designated "(R. __)" refer to the Record on Petitioner Jacobs' direct appeal. It was available to the Florida Supreme Court in its consideration of this original habeas corpus proceeding, having been incorporated by reference for that purpose, and is part of the Record here.

** The basis upon which certiorari was sought was the denial of a speedy trial, a matter not at issue here.

B. Facts Relevant to the Questions Presented

1. The Offense

As the facts were described by the Florida Supreme Court in its opinion on Petitioner Jacobs' direct appeal, see Jacobs v. State, supra, 396 So. 2d at 1115, and as otherwise supported in the Record, on the evening of March 4, 1974, Petitioner Jacobs and three companions -- his wife Paula, one Thomas Collins and one Elisha Chavis -- went to Ed's Country Store in rural Florida intending to rob the store. Prior to their arrival, the participants had been consuming intoxicating beverages. The extent of such consumption was not developed to any substantial extent at the trial, but was shown in pretrial proceedings to have been substantial.

Upon arriving at the store, Petitioner Jacobs and Chavis went inside, while, according to Paula's and Collins' testimony, Paula went to the restroom, and Collins remained outside near the car. While the robbery was in progress, the caretaker of the store, one Grant Ison, who was also heavily intoxicated, reached into his pocket for the gun that he carried, and Petitioner Jacobs shot and killed Ison before Ison shot Petitioner Jacobs. Seconds afterward, Chavis shot and killed the sole other occupant of the store, Barry Marsh, when Marsh charged Petitioner Jacobs with a large knife or machete.

Approximately eight months after the robbery, Paula went to Massachusetts, where she advised the Massachusetts State Police of the details of the offense, which were transmitted to the Pasco County Sheriff's Department, and which resulted in the arrest of Petitioner Jacobs, Chavis and Collins, each of whom was charged with murder in the first

degree.*

2. The Lockett Violation and the Failure to Argue It

After Petitioner Jacobs was convicted in the guilt phase of his trial, the sentencing phase immediately began.** In his defense in the sentencing phase, Petitioner Jacobs was called to the stand. He told the trial court that he had never been convicted of a crime of passion or violence. (R. 1705.)*** His trial counsel then asked:

> Q Do you know anything else that you wish to tell this jury in mitigation of this offense of which you have been convicted?

(R. 1705.) But this question was objected to. The prosecutor argued that it was too broad, because "it must follow the statute." Id. (emphasis added). The objection was sustained (R. 1706). Trial counsel for Petitioner Jacobs tried again:

> Q Is there anything you can say in your own behalf at this time, Mr. Jacobs?

(R. 1706). The prosecution raised another objection, and the objection was again sustained. Id.

The trial court accepted the prosecution's argument that the Florida death penalty statute did not allow

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* Subsequently, both Collins and Chavis pleaded guilty to murder in the second degree. Collins was sentenced to a five-year term, with credit for time served, and has been free for a number of years; Chavis was given a life sentence, and has a presumptive parole release date under which he would be free in approximately thirteen more years.

** The questions raised for review here involve only the sentencing phase.

*** This was never disputed by the prosecution, and Petitioner Jacobs earned the mitigating factor of "no significant history of prior criminal activity." See Fla. Stat. § 921.141(6)(a).

evidence of nonstatutory mitigating factors to be introduced. The bench conference at that time, among Jacobs' counsel, counsel for the prosecution, and the Court, made that clear:

> [Defense Counsel]: . . . We have a man on the stand that's faced with the decision as to what he's going to say concerning mitigation. Now, if he's going to be confined to just the items that are set forth in the statute as to mitigation, then he's said all he can say.
>
> [Prosecution]: Your Honor, I agree with [Defense Counsel]. I believe the defendant has said probably all he can say because the statute is very clear that not only is the State confined to those portions in Sections 6 and 7, but so is the Defendant. There are many things I'd like to say about this Defendant that I don't believe are admissible.
>
> THE COURT: [To Defense Counsel], I think that's well founded, sir. I sincerely do. I have the statute before me and I'd sustain the objection as to the question as framed.

(R. 1701) (emphasis added).

As is apparent from the above, the Court regarded any and all evidence of nonstatutory mitigating factors as barred, and did not inquire as to what the evidence would be. It did not request a proffer of the evidence, nor was one made. No further testimony by Petitioner Jacobs or by anyone else was heard.

Thus, by the clear ruling of the trial court, Petitioner Jacobs' evidence of nonstatutory mitigating factors was excluded: he was limited to the four corners of the statute in introducing evidence of mitigating factors.

At least in material part as a result of this ruling, Petitioner Jacobs' entire defense in the sentencing phase amounted to a total of nine questions -- of which the first three amounted to counsel's asking him his name; whether he was the defendant in the case; and whether he understood that the jury had convicted him of first degree murder.

The same counsel represented Petitioner Jacobs on his direct appeal. At no time during that appeal was the error of the exclusion of the testimony as to nonstatutory mitigating factors ever argued or brought to the attention of the Florida Supreme Court.

In the opinion below, the Florida Supreme Court acknowledged the Lockett violation and the fact that the point had never been raised on appeal. But it denied relief, as a result of the failure of that same counsel, after the extended colloquy described above, and after the trial court's ruling, to make a "proffer" of the evidence that would have been introduced.* It stated that, "Jacobs' appellate counsel failed to raise an issue which he was procedurally precluded from raising and cannot be considered incompetent for doing so." 450 So. 2d at 201.

On rehearing, Petitioner Jacobs pointed out the numerous bases upon which the Florida Supreme Court could have nevertheless considered the Lockett violation, if only the point had been argued on appeal. Without discussing any of them, rehearing was denied.

3. The Elledge Violation and The Failure to Argue It

In its ruling on Petitioner Jacobs' direct appeal, the Florida Supreme Court found error as a result of the double-counting of two of the aggravating circumstances -- because the trial court had improperly found both of the aggravating factors of "pecuniary gain," Fla. Stat.

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* As is apparent from the Record, no proffer was requested by the Court, either before or after the ruling. See (A.2).

§ 921.141(5)(f), and homicide "while . . . engaged . . . in . . . any robbery," § 921.141(5)(d), when under Florida law the trial court should have found only one of these to exist.* Thus, instead of finding that four aggravating factors existed, the trial court should have found that only three existed, of which one of them was the automatic aggravating factor which would arise in connection with any felony murder.**

Under Florida's well-known Elledge rule, see Elledge v. State, 346 So. 2d 998 (Fla. 1977), this should have resulted in a remand for rebalancing. Elledge sets forth Florida's procedure where aggravating factors have been invalidated, and held that where an aggravating factor was invalidated where there were no mitigating factors, rebalancing was not required; conversely, it held that rebalancing was required where there were mitigating factors against which the remaining aggravating factors had to be balanced.

Notwithstanding Elledge, however, and with two justices (other than those who dissented in the instant proceeding) dissenting for this reason, the Florida Supreme

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* The jury was also charged on, and permitted to consider, both of these aggravating factors.

** The others were "heinous, atrocious or cruel," Fla. Stat. § 921.141(5)(h) and "avoiding arrest," Fla. Stat. § 921.141(5)(e). Petitioner Jacobs believes that these findings were also improper, and challenged them below.

The Florida Supreme Court rejected the claims without setting forth the specific basis upon which it did so, setting forth three alternate rationales, without saying which rationale applied to which claim. See 450 So. 2d at 202. One of the three rationales was that the claims failed to "demonstrate a substantial error likely to have affected the outcome of the appeal," id. (emphasis added), a standard which would appear to be plainly inconsistent with Strickland v. Washington, 104 S.Ct. 2052 (May 14, 1984) decided after reargument was filed, and shortly before it was denied.

Court refused to remand after the invalidation of the aggravating factor. Though he could have and should have raised the Elledge error on reargument in the direct appeal, Petitioner Jacobs' prior counsel failed to do so.

In the opinion below, the Florida Supreme Court did not dispute that the Elledge issue was not raised, and that it could have been. But it dismissed the Elledge claim by noting that, "[r]emand for resentencing is not necessary every time an aggravating factor is stricken," see 450 So. 2d at 201, notwithstanding Petitioner Jacobs' claim below that adherence to the second half of the Elledge rule -- requiring remand where one or more mitigating factors were present -- was constitutionally required.

C. Prior Assertion of the Federal Questions

Petitioner Jacobs' claims for relief under Lockett and for ineffective assistance of counsel (see Question #1 of the Questions Presented) were raised in his original petition for habeas corpus. The Florida Supreme Court addressed these in the opinion below. After relief was denied for lack of a "proffer," the impropriety of such a denial was raised in Petitioner Jacobs' motion for rehearing. The Florida Supreme Court denied rehearing without opinion.

Petitioner Jacobs' claim for relief with respect to the Elledge violation (see Question #2 of the Questions Presented) (including his claim that compliance with Elledge was constitutionally required) was raised in the original petition for habeas corpus. The Elledge claim was addressed in the opinion below, without discussion of the differing Elledge rules when mitigating factors are present and when they are not. The distinction was raised in Petitioner Jacobs' motion

for rehearing, but, as noted, rehearing was denied without opinion.

The papers in which those claims were raised -- the petition for habeas corpus (A.16-117); the reply (A.118-198); and the motion for rehearing (A.199-247) -- appear in the Appendix.

REASONS FOR GRANTING THE WRIT

This petition seeks review of several matters important to the administration of justice in capital cases:

(1)(a) The constitutional propriety of a state court's disregard of Lockett violations as a result of asserted procedural missteps, both where, as here, the state court could have granted relief under its law, and where it could not;

(1)(b) The constitutional propriety of a state court's finding that counsel handling an appeal was not ineffective, even when a critically important issue was not raised, because of additional deficiencies in performance by the same counsel below; and

(2) The constitutional propriety of upholding a death sentence in the face of the recurring situation, where, on appeal, one or more aggravating factors which were relied upon by the trial court in sentencing the accused to death are invalidated, and where there exist one or more mitigating factors against which the aggravating factors had been balanced.

I

THE EXTENT OF A STATE COURT'S POWER TO IGNORE A LOCKETT VIOLATION FOR ASSERTED DEFICIENCIES IN PROCEDURAL RULES RAISES AN IMPORTANT QUESTION FOR THIS COURT TO DECIDE

This case presents an important issue going to the heart of the fairness of capital punishment: can this Court's

repeated pronouncements with respect to the critically important need to admit and consider evidence of the accused's character and the circumstances of the crime -- and thus, to require the admission of evidence of nonstatutory mitigating factors -- be wholly frustrated for the failure of a "proffer" which was never requested, and where the reviewing court's procedures permit it to consider error even where a proffer has not been made?

Here the record is clear that at the sentencing phase of Petitioner Jacobs' trial, the trial court -- in plain contravention of this Court's pronouncements in Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982), which were underscored in Justice O'Connor's concurrence in Eddings and her dissent in Enmund v. Florida, 458 U.S. 782 (1982) -- consciously excluded all evidence of nonstatutory mitigating factors. But Petitioner Jacobs' attorney, who had represented him at trial and was now representing him on his direct appeal, never raised the point. In the instant proceeding -- a state habeas corpus proceeding -- the Lockett violation was recognized (as was counsel's failure to raise it), but relief was denied for lack of a "proffer" -- which the trial court had never requested, and which the Florida Supreme Court need not have required.

Thus, the error below presents two technically separate but related issues: (1) under the Eighth and Fourteenth Amendments, since an accused cannot constitutionally be sentenced to death in a proceeding where evidence of nonstatutory mitigating factors is intentionally excluded, can a violation of a principle as fundamental as the Lockett one be ignored for the lack of a "proffer," where the trial court did not request it, and the reviewing court had the

power to consider the issue without it? And (2) under the Sixth Amendment, even in the absence of a "proffer," does the ineffective assistance of counsel evaporate because of additional failures by that counsel?

A. The Lack of the Proffer

1. The Lockett Issue

Here the Florida Supreme Court never questioned that there had been a Lockett violation. As Florida Supreme Court Justice McDonald stated in his dissent:

> I conclude that appellate counsel was ineffective when he failed to raise the issue of error in the trial judge's exclusion of nonstatutory mitigating evidence at the sentencing proceeding. The right to submit nonstatutory mitigating evidence is afforded to all persons facing a sentence of death. Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed.2d 973 (1978). The majority opinion recognizes this right but holds that appellate counsel could not argue this point because there had been no proffer.

450 So. 2d at 202.

Of course, this Court's opinions, starting with Woodson v. North Carolina, 428 U.S. 280 (1976), followed by Lockett, and coming all the way to Spaziano v. Florida, 104 S. Ct. 3154 (1984), have consistently emphasized that a sentencing court must allow the sentencer to consider the individual circumstances of the defendant, his background and his crime. See Woodson, supra, 428 U.S. at 304 (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion); Lockett, supra, 438 U.S. at 604; Zant v. Stephens, 103 S.Ct. 2733, 2743-2744, 2755 (1983); California v. Ramos, 103 S.Ct. 3446, 3452-3453 and n.13 (1983); Barclay v. Florida, 103 S.Ct. 3418, 3426, 3430 (1983); Spaziano, supra, 104 S.Ct. at 3162-3163 n.7. A Lockett violation, which denies the trial judge and jury the necessary picture of the character of the

accused, and requires the courts to make the decision as to death without the evidence of the individual whose life or death is in their hands, is, in the light of present capital sentencing doctrine, perhaps the most fundamental error that could ever occur.

We need not repeat at length this Court's numerous pronouncements on this subject. Justice O'Connor, speaking for this Court in Ramos, noted the key holding of Woodson:

> [W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

103 S.Ct. at 3452 n.13 (emphasis added). And significantly, Justice O'Connor approvingly quoted from the earlier plurality opinion of Justices Stewart, Powell and Stevens in Jurek v. Texas, 428 U.S. 262 (1976):

> What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.

103 S.Ct. at 3455 (emphasis added).

Then, in Barclay, upholding a death sentence under Florida's statute, the two opinions of Justice Rehnquist (for the plurality) and Justice Stevens (for himself and Justice Powell, concurring in the judgment) again emphasized the point which is critical here: that developing the record as to the character of the accused and the circumstances of the offense is fundamental to the imposition of the death penalty.

Justice Rehnquist emphasized, in describing what makes the Florida statutory scheme constitutionally acceptable, that even before this Court decided Lockett, ". . . the Florida Supreme Court had construed [the Florida] statute to permit

consideration of any mitigating circumstances." 103 S.Ct. at 3426 n.11 (emphasis in original). And in their concurring opinion, Justices Stevens and Powell emphasized that the constant theme of this Court's cases over the last eight years had been "emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner." Id. at 3429. Repeatedly mentioned in this connection was the right to introduce evidence of nonstatutory mitigating factors. In an important footnote, they noted that:

> As long as evidence of mitigation was not excluded from consideration at the sentencing proceeding, see Songer v. State, 365 So. 2d 696, 700 (Fla. 1978), . . . [the procedure followed in Barclay's case] was consistent with our decisions in Lockett . . . and Eddings. . . . Neither of these cases establishes the weight which must be given to any particular mitigating evidence, or the manner in which it must be considered; they simply condemn any procedure in which such evidence has no weight at all. . . . In this case [Barclay] does not contend that any relevant mitigating evidence was excluded from his initial sentencing hearing, or that the trial court or jury was precluded as a matter of law from considering any information or arguments in mitigation. *

103 S.Ct. at 3430 n.2 (emphasis added).

The teaching of these cases, as they apply to this issue, is clear. In each of Zant, Ramos and Barclay this Court upheld the state court's imposition of death sentences because what it regarded as most important had been satisfied: that the information presented to the trial court and jury was complete and accurate, and most significantly, that there was an "individualized" presentation of the character of the individual.* As it was put in Ramos, consideration of

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* Similarly, in Ritter v. Smith, 726 F.2d 1505 (11th Cir. 1984), a death penalty habeas corpus case from Alabama, the Eleventh Circuit read Lockett as holding that the

, Footnote Continued

character evidence was "constitutionally indispensable."

In light of these clearly established principles, the ability of state courts, such as the Florida Supreme Court here, to sidestep them for asserted procedural deficiencies raises an important question which this Court should review. That is true both where, as here, there is ample authority under state law to consider the Lockett violation, but also where, as several justices of this Court have recognized, such is required in the interests of justice.

2. Florida's Disregard of Its Own Rules

First, it should be noted that the Florida Supreme Court could, if only the Lockett point had been argued by Petitioner Jacobs' previous counsel, have granted relief for the undisputed Lockett violation under the Florida Evidence Code; under its doctrine of "fundamental error"; under the powers granted to it in connection with its review of capital cases; and under its doctrine of "futility." Thus, Section 104 of the Florida Evidence Code provides, in relevant part:

> (1) A court may predicate error, set aside or reverse a judgment, or grant a new trial on the basis of admitted or excluded evidence when a substantial right of the party is adversely affected and:
> . . .
> (b) When the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked.

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* Footnote Continued From Previous Page

Ohio sentencing "excluded the constitutionally relevant and indispensable consideration by the sentencer of any aspect of the defendant's character and record as an independently mitigating factor." Thus, it noted, the defendant's death sentence "was vacated without further inquiry." Id. at 1519 (emphasis added).

Fla. Stat. § 90.104 (emphasis added). Thus, under the Florida statute, a proffer or offer of proof was only one of the two ways by which Section 104's requirements could be satisfied. Here the substance of the evidence, that of nonstatutory mitigating factors, was clear from the context, and any evidence of that nature would have been admissible.

Secondly, Florida Evidence Code Section 104 further provides:

> (3) Nothing in this section shall preclude a court from taking notice of fundamental errors affecting substantial rights, even though such errors were not brought to the attention of the trial judge.

Fla. Stat. § 90.104. Thus, under the Florida Evidence Code, even if the evidentiary error were not brought to the attention of the trial court at all -- a situation, of course, not presented here where the trial judge carefully (though erroneously) considered the issue now before this Court -- the Florida Supreme Court would have had the power to rule on the Lockett violation. In the capital sentencing context, a Lockett violation would be about as fundamental as one could get.

Additionally, the Florida Supreme Court has repeatedly held that it can review any issue concerning the sentencing trial in a capital case, even though that issue has not been raised by the parties or objected to at trial. See, e.g., LeDuc v. State, 365 So. 2d 149, 150 (Fla. 1978), cert. denied, 444 U.S. 865 (1979); Goode v. State, 365 So. 2d 381, 384 (Fla. 1978), cert. denied, 441 U.S. 967 (1979); Jacobs (Sonia) v. State, 396 So. 2d 713, 717-718 (Fla. 1981); Elledge v. State,

346 So. 2d 998, 1002 (Fla. 1977).* In Elledge, the Florida Supreme Court found error in the consideration of a nonstatutory aggravating factor, and considered it notwithstanding a failure to object at trial, because the failure to object, ". . . should not be conclusive of the special scope of review by this Court in death cases." 346 So. 2d at 1002.

Further, the Florida Supreme Court had the power to review the Lockett violation under the substantial body of Florida law that to preserve points for appeal, counsel need not engage in futile acts after the trial court has already ruled on an issue. See Thomas v. State, 419 So. 2d 634, 636 (Fla. 1982); Brown v. State, 206 So. 2d 377, 384 (Fla. 1368); Kindell v. State, 413 So. 2d 1283, 1286 (Fla. 3d DCA 1982). That doctrine has repeatedly permitted parties to raise points on appeal notwithstanding failures to proffer, even in non-capital cases where the appellate courts have lesser powers to consider the whole record. See Seeba v. Bowden, 86 So. 2d 432, 434 (Fla. 1956); Wright v. Schulte, 441 So. 2d 660, 663 (Fla. 2d DCA 1983); Taco Nacho, Inc. v. Hasty House Restaurants Inc., 436 So. 2d 403, 406-407 (Fla. 1st DCA 1983); General Portland Development Co. v. Stevens, 291 So. 2d 250, 251 (Fla. 4th DCA 1974). Citing the Florida Supreme Court's decision in Seeba, the court in Taco Nacho noted, "[t]he rule is clear that if a proffer would be unavailing, failure to proffer the testimony will not preclude the urging of it upon appeal." 436 So. 2d at 407 (emphasis added). Thus here -- though any one

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* Indeed, in Petitioner Jacobs' initial appeal, the Florida Supreme Court noted an error which had not been raised at trial or on the appeal. See Jacobs (Eligaah) v. State, 396 So. 2d at 1118-1119.

would be sufficient -- three of the Florida Supreme Court's tests in Seeba were met: a proffer is unnecessary, ". . . where the offer would be a useless ceremony, or the evidence is rejected as a class, or where the court indicates such offer would be unavailing." See 86 So. 2d at 434.

Accordingly, the Florida Supreme Court's insistence on a proffer here, in light of its well settled case law, was inexplicable. But its essentially arbitrary invocation of that requirement to ignore a deprivation of such a substantial constitutional right cannot be, and is not, determinative.

For this Court has repeatedly held that discretionary state procedural determinations may not have the effect of denying this Court the power to address the deprivation of constitutional rights. See Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 233-234 (1969); Henry v. Mississippi, 379 U.S. 443, 447 (1965); NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 297, 301 (1964); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); Williams v. Georgia, 349 U.S. 375, 383, 389 (1955). As these cases have been synthesized by one commentator, this Court's consideration of constitutional rights may not be thwarted:

> [B]y the simple recitation in the state court's decision that there has not been observance of a procedural rule with which there has been compliance, in both substance and form, in every real sense.

Annot., 24 L. Ed.2d 837, 842 (1970).

Even where the state court has decided not to address the federal claim, where, as here, the state court has the power to entertain it, this Court can review it. See Sullivan, supra, 396 U.S. at 234. This Court can and should consider these claims if, as we believe (in light of the considerable mass of Florida authority, ignored by the Florida Supreme

Court, empowering it to consider the Lockett violation), the state refusal to consider the matter was "without any fair or substantial support," see NAACP v. Alabama ex rel. Patterson, 357 U.S. at 454-455; Ward v. Board of County Commissioners, 253 U.S. 17, 22 (1920), or even if it made an entirely proper, but discretionary, determination. See Williams v. Georgia, supra, 349 U.S. at 359. As Justice Frankfurter, speaking for the Court, said in Williams:

> We conclude that the trial court and the State Supreme Court declined to grant Williams' motion though possessed of power to do so under state law. Since his motion was based upon a constitutional objection, and one the validity of which has in principle been sustained here, the discretionary decision to deny the motion does not deprive this Court of jurisdiction to find that the substantive issue is properly before us.

Id.

B. The "Interests of Justice"

Moreover, even if Florida law did require a proffer, and/or the Florida Supreme Court had not arbitrarily disregarded substantial law which would have permitted it to consider the Lockett violation, a Lockett violation is so fundamental that even if it had never been raised below, it would have warranted reversal in the "interests of justice." See Strickland v. Washington, supra, 104 S.Ct. 2052 (Brennan, J. concurring in part and dissenting in part); Eddings v. Oklahoma, supra, 455 U.S. at 117-120 & 117 n.* (Justice O'Connor, concurring). Indeed, that is the clear teaching of Eddings, wherein this Court reversed as a consequence of the Lockett violation -- even though certiorari had been taken on the "narrow question" as to the constitutional propriety of imposition of a death sentence on an offender who was sixteen years old at the time of the offense, id. at 120 (Burger, C.J.,

dissenting), and where the claim was neither presented to the Oklahoma courts nor presented to this Court in the petition for certiorari. Id. And this Court granted relief for the Lockett violation notwithstanding the concerns expressed by several members of the Court that the claim not only was not presented to this Court, but also was never "fairly presented" to the Oklahoma State courts. See id. at 120 n.1.

In his opinion concurring in part and dissenting in part in Strickland (but which was concurring as to this aspect), Justice Brennan explained the rationale under which this Court could reverse for Lockett violations notwithstanding the obvious procedural missteps -- the failures to raise the issue at all in the state courts below. He said:

> [A] sentencing judge's failure to consider relevant aspects of a defendant's character and background creates such an unacceptable risk that the death penalty was unconstitutionally imposed that, even in cases where the matter was not raised below, the "interests of justice" may impose on reviewing courts "a duty to remand [the] case for resentencing." [Eddings v. Oklahoma, 455 U.S.] at 117 n.* and 119 (O'Connor, J., concurring.).

104 S.Ct. at 2074.

C. The Ineffective Assistance of Counsel

In Strickland v. Washington, supra, 104 S.Ct. 2052 (1984; (decided after Petitioner Jacobs' rehearing motion had been filed), this Court substantially clarified the law of effective assistance of counsel. It there described its "benchmark" for judging ineffectiveness claims: "[W]hether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 2064. Describing the showing that a convicted defendant would have to make, this Court established two components: (1) that counsel's performance was deficient; and (2) that this deficiency

prejudiced the defense, to the extent that the result was unreliable. Id.*

Those requirements were exactly met here. Petitioner Jacobs' prior counsel's total failure to argue the Lockett point, despite the extensive colloquy below and the obviousness of the issue, was a deficiency measurably below that of competent counsel, and the exclusion of mitigating factor evidence, going, as it does, to the heart of the determination as to whether Petitioner Jacobs should live or die, most emphatically resulted in, ". . . a breakdown in the adversary process that renders the result unreliable." Id. at 2064.

In ruling on Petitioner Jacobs' ineffective assistance claim, the Florida Supreme Court's discussion was brief. It stated only that, "Jacobs' appellate counsel failed to raise an issue which he was procedurally precluded from raising and cannot be considered incompetent for doing so." See 450 So. 2d at 201.

But this analysis cannot be squared with Strickland. It did not say whether it regarded the total failure of Petitioner Jacobs' former counsel to argue a critical issue as not falling below applicable standards, or whether it merely concluded that Petitioner Jacobs was not prejudiced. See id. at 201-202. And if the majority below meant what it said when

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* In considering the prejudice standard, this Court rejected the notion that a defendant would have to show that counsel's deficient conduct "more likely than not altered the outcome in the case." 104 S.Ct. at 2068. The prejudice question would turn on:

> [W]hether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 2069 (emphasis added).

it looked to see whether Petitioner Jacobs' former counsel was "incompetent," see id. at 201, Strickland puts forward a different test. An accused must merely show that the particular errors of counsel were "unreasonable," and that they "actually had an adverse effect on the defense." See 104 S.Ct. at 2067. The opinion below, and this Court's decision in Strickland, are ships passing in the night. And it would be the ultimate irony if relief were denied on Petitioner Jacobs' ineffective assistance of counsel claim because of additional deficiencies by that same counsel in the court below.

The application of the Strickland principles to counsel handling a capital appeal -- and the interplay between asserted errors on the part of that same counsel in his handling of the trial and his appellate performance -- represent important issues that should be considered by this Court.

The opinion below is not only wholly inconsistent with this Court's holdings in Lockett, Eddings and Strickland; it raises questions significant to the administration of justice in capital cases -- particularly the extent to which the Lockett principle can be vitiated when counsel does not do (or is said not to have done) his job. If this case is not summarily remanded for reconsideration in light of those cases, this Court should grant certiorari to address these issues.

II

THE CONSTITUTIONAL PROPRIETY OF UPHOLDING A DEATH SENTENCE IN A "BALANCING" STATE, FOLLOWING THE INVALIDATION OF AGGRAVATING FACTORS WHERE MITIGATING FACTORS EXIST, RAISES AN IMPORTANT AND RECURRING QUESTION WHICH SHOULD BE DECIDED

In Barclay v. Florida, supra, this Court became well aware of Florida's "Elledge" principle. See Barclay, supra,

103 S. Ct. at 3426-3427 (plurality opinion of Rehnquist, J.); id. at 3432 (Stevens and Powell, JJ., concurring). Elledge v. State, supra, 346 So. 2d 998, 1002-1003 (Fla. 1977), sets forth the Florida state law rule with respect to the need for rebalancing after the invalidation of aggravating factors.

Under the Elledge rule, the need to remand for rebalancing turns upon whether mitigating factors exist. Under the first prong of the Elledge rule, which applies if there are no mitigating factors, the Florida Supreme Court finds it unnecessary to remand for rebalancing, because -- in the absence of any mitigating factors to balance against the aggravating ones -- the result could not have been different. Under the second prong, where one or more mitigating factors do exist, a different rule applies. Because of the appellate court's inability to predict how the balancing might have come out, a remand for rebalancing is required.

In Elledge, after finding that the trial court had considered an aggravating factor which it should not have, the Florida Supreme Court recognized its inability, as an appellate court, to ascertain whether the weighing process by both the jury and judge would have been different if the impermissible aggravating factor had not been present. It recalled the early principle it laid down, in State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), when it first upheld Florida's post-Furman death penalty:

> [T]he procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in

> light of the totality of the circumstances present. . . .

346 So. 2d at 1003.

Since the effect of the admission of the invalidated aggravating factor on the trial judge and jury was thus unquantifiable, the Florida Supreme Court, in Elledge, remanded for a new sentencing hearing:

> Would the result of the weighing process by both the jury and judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know, and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial. . . .

346 So. 2d at 1003.

The Elledge rule was discussed at considerable length in this Court's decision in Barclay. There it was argued that the first prong of the Elledge rule -- permitting a death penalty to stand where there were no statutory mitigating factors -- ran afoul of Lockett, by failing also to consider the presence of nonstatutory mitigating factors. The judgment of this Court, as reflected in Justice Rehnquist's plurality opinion (joined by the Chief Justice, Justice White and Justice O'Connor) and the opinion of Justice Stevens (joined by Justice Powell), was that consideration of statutory mitigating factors in the application of the first prong of the Elledge rule was constitutionally sufficient.

But in Barclay, all of the members of the Court took as a given the second prong of the Elledge rule -- that there would be a remand for resentencing in the presence of statutory mitigating circumstances. Justice Rehnquist's plurality opinion noted, explaining Elledge, "[i]f the trial court found that some mitigating circumstances exist, the case will

generally be remanded for resentencing."* 103 S. Ct. at 3426-3427. It construed Elledge as saying that, "[i]f the trial court properly found that there are no mitigating circumstances, the Florida Supreme Court applies a harmless error analysis." Id. at 3427 (emphasis added). And it went on to add that, "[t]he Florida Supreme Court has not always found that consideration of improper aggravating factors is harmless, even when no mitigating circumstances exist." Id. (emphasis added).

Even more directly on point here was the concurrence of Justices Stevens and Powell. Expressing their reluctance to join fully in the plurality opinion, they concurred in the Barclay judgment because they were ". . . convinced that Florida has retained the procedural safeguards that supported our decision to uphold the scheme in Proffitt. . . ." Id. at 3429. One of those safeguards, which made Florida's sentencing procedures constitutionally acceptable, was the Elledge rule. As they put it, Elledge enunciated the "touchstone" for determining whether the invalidation of an aggravating factor was reversible error: "the presence or absence of mitigating circumstances." Id. at 3432 n.12 (emphasis added). They continued:

> As long as mitigating circumstances had been found, it was impossible to know whether the result of the statutorily-required weighing process would have been different in the absence of the impermissible non-statutory aggravating factor.

Id. (emphasis added). They reasoned that Florida's procedure was constitutionally acceptable because, "[b]y definition, one or more statutory aggravating circumstances will always

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* The opinion did not expand upon its use of the word "generally," and did not state the nature and extent of any exceptions.

outweigh the complete absence of statutory mitigating circumstances." Id. (emphasis added).*

Now, however, it appears that the procedural safeguards that caused this Court to uphold Florida's sentencing scheme in Proffitt v. Florida, 428 U.S. 242 (1976), and again in Barclay, have been heavily eroded. The second prong of the Elledge rule -- a premise upon which all of the Justices concurring in the Barclay judgment relied, has now been undercut. Here, notwithstanding that Petitioner Jacobs had earned a statutory mitigating factor -- no significant history of prior criminal activity -- it was ignored by the Florida Supreme Court. Without overruling Elledge, it refused to remand for rebalancing, thus pushing to the side one of the safeguards upon which Justices Stevens and Powell had expressly relied.

In fact, without overruling Elledge, the Florida Supreme Court has in numerous instances failed to follow the second prong of the Elledge rule, requiring remand in the presence of one or more mitigating factors. See Hargrave v. State, 366 So. 2d 1, 5 (Fla. 1978), cert. denied 444 U.S. 919 (1979) (two mitigating factors present); Brown v. State, supra, 381 So.2d at 696 (one mitigating factor present); Vaught v. State, 410 So. 2d 147, 150-151 (Fla. 1982) (two mitigating factors present); Jackson v. Wainwright, 421 So. 2d 1385, 1388 (Fla. 1982) (two mitigating factors present); Jacobs v. Wainwright, supra, 450 So. 2d 200, 201 (one mitigating factor present).

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* They considered Brown v. State, 381 So. 2d 690, 696 (Fla. 1980), cert. denied, 449 U.S. 1110 (1981), the only case recognized as one where the Florida Supreme Court did not follow the Elledge rule, as consistent, because the mitigating circumstance had not really been established: the appellant's age, which apparently was in a "gray area, and had "only 'some minor significance.'" See 103 S. Ct. at 3432-3433 n.12.

In Petitioner Jacobs' case, the Florida Supreme Court did not really attempt to reconcile its holding with Elledge. In its discussion of the Elledge issue, it merely noted that, "[r]emand for resentencing is not necessary every time an aggravating factor is stricken." See Jacobs v. Wainwright, supra, 450 So. 2d at 201. But that, needless to say, wholly failed to address the "touchstone" -- the presence or absence of mitigating circumstances. In support of its broad statement, the Florida Supreme Court cited only one case, Armstrong v. State, 429 So. 2d 287 (Fla. 1983). But Armstrong was a case in which there were no mitigating circumstances.*

Upholding a death sentence after the invalidation of aggravating factors where mitigating factors are present raises serious constitutional issues. Unlike the Georgia statute, compare Zant v. Stephens, supra, the Florida statute provides the guided discretion required under Furman v. Georgia, 408 U.S. 238 (1972), by requiring juries and judges to balance the aggravating factors against the mitigating ones. See Barclay, 103 S. Ct. at 3442 n.17 (Marshall and Brennan, JJ., dissenting).

Given, as the Florida Supreme Court has expressly held, that such balancing is not a mechanical process of adding up the number of aggravating factors and mitigating ones, see Elledge, 346 So. 2d at 1003, and Dixon, 283 So. 2d at 10, it obviously is impossible, as Elledge expressly held, for the

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* The Florida Supreme Court's ruling in Armstrong came down on exactly that reason:

> Our holding was that the erroneous findings in aggravation did not impair the process of weighing the aggravating circumstances against the mitigating circumstances because there were no mitigating circumstances to weigh.

Id. at 291 (emphasis added).

appellate court to know whether the decision of trial jury and judge would have been different if the improper aggravating factor had not been considered.* Thus, the procedure by which Florida imposes the death sentence, cf. Ramos, supra, 103 S.Ct. at 3451, becomes a guessing game. The essential element of reliability and "measured, consistent application and fairness to the accused," see Barclay, 103 S.Ct. at 3429 (Stevens, J., concurring), and cases cited therein, is clearly negated.

Similarly, the Florida Supreme Court's inconsistent disposition of the cases where mitigating factors exist gives rise to the exact kind of inconsistency of treatment that Furman condemned. Compare Riley v. State, 366 So. 2d 19, 22 (Fla. 1978) (remanded for rebalancing where one mitigating factor existed); Mikenas v. State, 367 So. 2d 606, 610 (Fla. 1978) (remanded for rebalancing where one mitigating factor existed); Menendez v. State, 368 So. 2d 1278, 1281 (Fla. 1979) (remanded for rebalancing where one mitigating factor existed); with Hargrave, supra, 366 So. 2d at 5 (refusing to remand where two mitigating factors were present); Brown, supra, 381 So. 2d at 696 (refusing to remand where one mitigating factor existed); Vaught, supra, 410 So. 2d at 150-151 (refusing to remand where two mitigating factors were present); Jackson, supra, 421 So. 2d at 1388 (refusing to remand where two mitigating factors were present); Jacobs, supra, 450 So. 2d at 201 (refusing to remand where one mitigating factor existed).

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* Significantly, in Mikenas v. State, 367 So. 2d 606 (Fla. 1978), the Florida Supreme Court said, "[i]t is not the function of this Court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court." Id. at 610.

Moreover, a death sentence upheld under these circumstances suffers from many of the same infirmities which caused the sentence in Stromberg v. California, 283 U.S. 359 (1931), to be upset. There, of course, a statute directed at possibly subversive activity barred three different kinds of conduct, and the defendant was charged with violating the statute in all three kinds of ways. One of the clauses was held to be unconstitutional, as violative of the First Amendment, but the state court affirmed on the basis of the remainder. This Court reversed. It was impossible to say under which clause of the statute the conviction was obtained.

Here the same principle applies. Just as this Court could not permit the California Supreme Court to speculate as to the grounds upon which the Stromberg jurors could have found the defendant there guilty, here the Florida Supreme Court should not be permitted to speculate as to whether the jurors and trial court would have reached the same conclusion as to death had the improper aggravating factor not been considered.

The issue which arises here is an important one, coming up repeatedly in capital punishment litigation. The Florida Supreme Court (and presumably other appellate courts whose capital punishment statutes are "balancing" ones) frequently has occasion to determine that one or more of the aggravating factors relied upon in the trial court are invalid. In many cases, the defendants have one or more mitigating factors against which the aggravating ones are balanced. The practice of substituting the appellate court's judgment for that of the trial court and jury, when the appellate court concededly cannot know how the jury and court would have engaged in the rebalancing, is constitutionally unacceptable. If this Court's admonitions regarding reliability in capital sentencing are to have any meaning, the writ should be granted.

CONCLUSION

For the reasons expressed herein, the petition for a writ of certiorari should be granted.

Dated: New York, New York
August 31, 1984

Respectfully submitted,

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No. 84-5389

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ELIGAAH ARDALLE JACOBS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,
Secretary, Department of Corrections,
State of Florida,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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EDITOR'S NOTE

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Elijah Ardalle JACOBS, Petitioner,

v.

Louie L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida, Respondent.

No. 42395.

Supreme Court of Florida.

Feb. 23, 1984.

Rehearing Denied June 14, 1984.

Petitioner imprisoned under sentence of death sought writ of habeas corpus. The Supreme Court, Adkins, J., held that: (1) appellate counsel was not incompetent on ground that he failed to argue that trial court's exclusion of nonstatutory mitigating factors at sentencing was error, (2) appellate counsel was not incompetent on ground that he failed to move for a resentencing upon rehearing, and (3) appellate counsel was not incompetent on ground that he failed to argue a violation of Federal Constitution arising from denial of speedy trial.

Petition denied.

McDonald, J., concurred in part and dissented in part and filed opinion, in which Overton, J., joined.

1. **Criminal Law** ⇐999(4)

Whether trial counsel's omissions were strategic or negligent can only be determined by trial court pursuant to motion for postconviction relief, subject, of course, to appellate review. West's F.S.A. RCrP 3.850.

2. **Criminal Law** ⇐670

Purpose of a proffer of attempted testimony is to put into record testimony which is excluded from jury so that an appellate court can consider admissibility of excluded testimony; reversible error cannot be predicated on conjecture.

3. **Criminal Law** ⇐641.13(7)

Petitioner's appellate counsel was not incompetent on ground that he erred in failing to argue that trial court's exclusion of nonstatutory mitigating factors at sentencing was error, in that counsel was procedurally precluded from raising this issue because there was no proffer of attempted testimony after trial court excluded it.

4. **Criminal Law** ⇐641.13(7)

Petitioner's appellate counsel was not incompetent on ground that he failed to move for resentencing upon rehearing after aggravating factor was stricken.

5. **Criminal Law** ⇐1181

Remand for resentencing is not necessary every time an aggravating factor is stricken.

6. **Criminal Law** ⇐1133

Motion for rehearing shall not reargue merits of court's order.

7. **Criminal Law** ⇐641.13(7)

Petitioner's appellate counsel was not incompetent on ground that he failed to argue a violation of Federal Constitution arising from denial of speedy trial, particularly where he did argue issue based on State Constitution and it was resolved finding no violation.

8. **Criminal Law** ⇐641.13(1)

Constitutional guarantees to a fair trial and competent attorney do not insure that defense counsel will raise every conceivable constitutional claim. U.S.C.A. Const.Amend. 6.

9. **Criminal Law** ⇐641.13(7)

Petitioner's appellate counsel was not incompetent on ground that he failed to argue that admission, in sentencing proceeding, of trial testimony to effect that petitioner's three accomplices were afraid of him constituted introduction of a nonstatutory aggravating factor, in that statute provides for liberal admissibility of relevant evidence at sentencing phase and trial court mentioned only statutory aggravating circumstances in instructing jury. West's F.S.A. § 921.141(1).

10. Criminal Law ⇐641.13(7)

Petitioner's appellate counsel was not incompetent on ground that he failed to argue error of failure to charge jury of need to prove aggravating circumstances beyond a reasonable doubt, failed to argue improper jury charge as to party with burden of proof, failed to instruct jury on nonstatutory mitigating factors, failed to argue that jury charge gave jury improper discretion, failed to argue lack of proper consideration of applicable statutory mitigating facts, failed to argue that death sentence based on killing by coparticipant was unconstitutional and improper, and failed to argue the cumulative effect of errors in sentencing phase, in that each failed to either demonstrate any error on part of appellate counsel, demonstrate a serious deficiency measurably below standard expected of competent counsel, or demonstrate a substantial error likely to have affected outcome of appeal.

Patrick D. Doherty of Gross & Doherty, Clearwater, and Robert E. Gerber and Mary Gilmore of Fried, Frank, Harris, Shriver & Jacobson, New York City, for petitioner.

Jim Smith, Atty. Gen., and John W. Tiedemann, Asst. Atty. Gen., Tallahassee, for respondent.

ALVIN, Justice.

We have before us a petition for a writ of habeas corpus. The petitioner is now imprisoned under sentence of death pursuant to judgment and sentence affirmed by this Court in *Jacobs v. State*, 396 So.2d 1113 (Fla.), *cert. denied*, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981). We have jurisdiction. Art. V, § 3(b)(9), Fla. Const.

The petitioner, JACOBS, alleges that he was subject to ineffective assistance of appellate counsel. He bases this allegation on claims of eleven perceived failings of his counsel. We will assess Jacobs' claims according to the principles of *Knight v. State*, 394 So.2d 997 (Fla.1981). In *Knight*, we adopted the four step process which is encompassed in *United States v. DeCoster* (*DeCoster III*), 624 F.2d 196 (D.C.Cir.1979) (en banc). Since *Knight*, those elements must be present in order to demonstrate ineffectiveness of counsel.

[1] We will not involve ourselves in an examination of the performance of Jacobs' trial counsel. Whether trial counsel's omissions were strategic or negligent can only be determined by the trial court pursuant to a motion for post-conviction relief, Fla.R.Crim.P. 3.850, subject, of course, to appellate review.

[2, 3] Jacobs first alleges that his appellate counsel erred in failing to argue that the trial court's exclusion of nonstatutory mitigating factors at sentencing was error. There was no proffer of the attempted testimony after the trial judge excluded it. The purpose of a proffer is to put into the record testimony which is excluded from the jury so that an appellate court can consider the admissibility of the excluded testimony. Reversible error cannot be predicated on conjecture. *Salvador v. State*, 366 So.2d 432 (Fla.1978), *cert. denied*, 439 U.S. 911, 99 S.Ct. 1226, 59 L.Ed.2d 1229 (1979); *See Singer v. State*, 109 So.2d 7 (Fla.1959). Jacobs' appellate counsel failed to raise an issue which he was procedurally precluded from raising and cannot be considered incompetent for doing so.

[4–6] Jacobs next alleges that appellate counsel erred in failing to move for a resentencing upon rehearing, on the authority of *Elledge v. State*, 346 So.2d 998 (Fla.1977), after this Court had found an improper doubling of aggravating circumstances in the sentencing phase. We addressed this issue in Jacobs' direct appeal, 396 So.2d at 1119, and decided that *Elledge* did not apply in this instance. Remand for resentencing is not necessary every time an aggravating factor is stricken. *Armstrong v. State*, 429 So.2d 287 (Fla.1983). A motion for rehearing shall not reargue the merits of the Court's order. *See* Fla.R.App.P. 9.330(a). Appellate counsel's failure to make this argument is not a serious deficiency measurably below that of competent counsel. It is no deficiency at all.

[7, 8] The next claim is that Jacobs' appellate counsel failed to argue a violation of the Federal Constitution arising from denial of speedy trial. Appellate counsel did argue this issue based on the Florida Constitution and we resolved it finding no violation. 396 So.2d at 1116. Counsel's failure to make the argument based on the Federal Constitution as well does not establish incompetence. Constitutional guarantees to a fair trial and competent attorney do not insure that defense counsel will raise every conceivable constitutional claim. *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *Francois v. State*, 424 So.2d 737 (Fla.1982).

[9] Jacobs also contends that the admission, in the sentencing proceeding, of trial testimony to the effect that Jacobs threw accomplices were afraid of him constituted introduction of a nonstatutory aggravating factor. He contends that his appellate counsel erred in not raising this issue on appeal. We find this contention to be without merit in as much as section 921.141(1) provides for liberal admissibility of relevant evidence at the sentencing phase. Additionally, the trial judge mentioned only the statutory aggravating circumstances in instructing the jury.

[10] Jacobs' next seven errors complained of are as follows: 1) failure to argue error of failure to charge jury of need to prove aggravating circumstances beyond a reasonable doubt, 2) failure to argue improper jury charge as to party with burden of proof, 3) failure to instruct jury on nonstatutory mitigating factors, 4) failure to argue that the jury charge gave jury improper discretion (trial judge read the statutory aggravating and mitigating circumstances to the jury verbatim), 5) failure to argue lack of proper consideration of applicable statutory mitigating factors, 6) failure to argue that death sentence based on killing by coparticipant was unconstitutional and improper, and 7) failure to argue the cumulative effect of the errors in the sentencing phase. We find these allegations to be without merit. Each fails to either: 1) demonstrate any error on the part of appellate counsel, 2) demonstrate a serious deficiency measurably below the standard expected of competent counsel, or 3) demonstrate a substantial error likely to have affected the outcome of the appeal. *See Armstrong v. State*; *Straight v. Wainwright*, 422 So.2d 827 (Fla.1982); *Francois v. State*; *Knight v. State*; *Songer v. State*, 365 So.2d 696 (Fla.1978), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979).

We hold that the petitioner is not entitled to relief and deny the petition for writ of habeas corpus.

It is so ordered.

ALDERMAN, C.J., and BOYD, EHRLICH and SHAW, JJ., concur.

McDONALD, J., concurs in part and dissents in part with an opinion, in which OVERTON, J., concurs.

McDONALD, Justice, concurring in part, dissenting in part.

I conclude that appellate counsel was ineffective when he failed to raise the issue of error in the trial judge's exclusion of nonstatutory mitigating evidence at the sentencing proceeding. The right to submit nonstatutory mitigating evidence is afforded to all persons facing a sentence of death. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The majority opinion recognizes this right but holds that appellate counsel could not argue this point because there had been no proffer.

A general question of mitigating circumstances asked of the defendant was disallowed. The trial judge then made it unmistakably clear that only evidence of statutory mitigating circumstances would be allowed. Because the nature of the excluded evidence was apparent, a proffer of the nonstatutory mitigating circumstances [illegible] appeal. Because of this error I would

effect retrial and require a new sentencing hearing.

On all other issues I concur with the opinion.

OVERTON, J., concurs.

from sentencing a defendant to a term in excess of one year and thereafter place him on probation to ensure his supervision after the completion of his sentence. I agree that a maximum precedent for probation should not exceed one year, but at the same time a trial judge should have the option of requiring probation after a specified jail sentence. To the extent that this decision prevents that, I dissent.

Elijah Ardalle JACOBS, Appellant,
v.
STATE of Florida, Appellee.
No. 60365.
Supreme Court of Florida.
Feb. 26, 1981.
Rehearing Denied May 6, 1981.

Defendant was convicted before the Circuit Court, Pasco County, Ray E. Ulmer, Jr., J., of first-degree murder, was sentenced to death, and he appealed. The Supreme Court, Adkins, J., held that: (1) refusal to give instruction that intoxication may negate specific intent required to establish commission of first-degree murder was not error; (2) defendant was not denied a speedy trial; (3) purge of grand jurors from voire list prior to indictment did not render the indictment unlawful; (4) it was not constitutionally impermissible to allow one "trigger man" to plead guilty and be sentenced to life imprisonment, while defendant exercised his right to jury trial and ultimately received a death sentence; (5) refusal to allow defendant to inform jury in closing argument of sentences imposed on accomplices was not error; and (6) consideration of the factual situation as constituting four aggravating circumstances instead of three, in trial judge's finding in support of death sentence, was error but was not prejudicial.

Affirmed.

Sundberg, C.J., and England, J., concurred in affirmance of convictions of guilt, but dissented, with reasons, from affirmance of the death sentences.

1. Homicide ⇐19(1)

In cases of felony-murder, mental element of offense is that which is required for felony; premeditation is supplied by the felony.

2. Homicide ⇐27

A defendant charged with first-degree felony-murder on account of a killing during the commission of a robbery may defend himself on the ground that he was unintoxicated to entertain intent to rob.

3. Criminal Law ⇐774

Jury instructions regarding intoxication need not be given in every case in which evidence has been adduced at trial that defendant consumed alcoholic beverages prior to commission of offense.

4. Homicide ⇐294(2)

Refusal to give instruction that intoxication may negate the specific intent required to establish commission of first-degree murder was not error, since accomplices' testimony showed that robbery was carried out from a premeditated plan and, until fatal shooting erupted, it was successful, since the evidence clearly showed that defendant was capable of reflection at the time of the homicides and premeditation was thus proved, and since, this being so, the felony-murder evidence was merely cumulative to show premeditation.

5. Criminal Law ⇐577.13

Only trial court, not appellate court, may grant extension of speedy trial time period while interlocutory appeal is pending. 33 West's F.S.A. Rules of Criminal Procedure, Rule 3.191.

6. Criminal Law ⇐577.10(2)

Absent time limitations of the speedy trial rule, question of whether trial date affords defendant speedy trial must be determined in light of circumstances of particular case as matter of judicial discretion; mere lapse of time before trial is not only factor to be considered under such circumstances. 33 West's F.S.A. Rules of Criminal Procedure, Rule 3.191.

7. Criminal Law ⇐577.10(2)

Rule that, absent time limitations of the speedy trial rule, question of whether trial date affords defendant speedy trial must be determined in light of circumstances of particular case as matter of judicial discretion is equally applicable whether defendant or the state seeks continuance. 33 West's F.S.A. Rules of Criminal Procedure, Rule 3.191.

8. Criminal Law ⇐577.13

In prosecution for first-degree murder, trial court's grant of continuance to state for a reasonable period of time after appellate court filed opinion on interlocutory appeal from suppression order did not violate speedy trial rule, since trial court could grant extension of speedy trial time period while interlocutory appeal was pending, and state, applying the constitutional test of reasonableness, the trial date afforded defendant a speedy trial. 33 West's F.S.A. Rules of Criminal Procedure, Rule 3.191.

9. Indictment and Information ⇐18.1(2)

Purge of grand juror, who was qualified elector at time her name was placed on jury list, from voter list prior to indictment of defendant for first-degree murder did not render indictment unlawful. West's F.S.A. § 40.01.

10. Constitutional Law ⇐268.3(1)

Allowing one "trigger man," in felony-murder involving two "trigger men," to plead guilty and be sentenced to life imprisonment, while defendant, the other "trigger man," exercised his right to a jury trial, was convicted, and received a death sentence, did not deny equal protection to defendant and was constitutionally permissible. U.S.C.A.Const. Amend. 14.

11. Homicide ⇐354

Jury should be allowed to weigh all facts and circumstances surrounding the homicide, so that their advisory verdict will be the result of reasoned judgment rather than an exercise in discretion, but this does not mean that evidence which is admissible at the sentencing hearing is also admissible at trial, nor does this mean that the state or trial judge must provide the jury with such information if defendant fails to do so. West's F.S.A. § 921.141.

12. Criminal Law ⇐706(2)

Generally, it is improper for state to disclose that another defendant in same case has been convicted.

13. Criminal Law ⇐710

Refusal to allow defendant to inform jury at closing argument in prosecution for first-degree murder of the sentences imposed on his accomplices was not error; such evidence would only be admissible at the sentencing hearing. West's F.S.A. § 921.141.

14. Homicide ⇐354

Trial judge's consideration, in finding in support of death sentence, that murder committed for pecuniary gain during course of robbery, coupled with heinous manner in which death was inflicted, as well as circumstance that death was inflicted for purpose of avoiding detection, constituted four aggravating circumstances instead of three was error, but this technical error in no way affected his reasoned judgment in imposing the death sentence.

15. Criminal Law ⇐1208(1)

Trial judge must exercise a reasoned judgment as to what factual situations require imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances.

Lester Bains, Jr., Zephyrhills, for appellant.

Jim Smith, Atty. Gen., and Charles W. Musgrove, Asst. Atty. Gen., Tallahassee, for appellee.

ADKINS, Justice.

This is a direct appeal from judgments adjudging defendant guilty of murder in the first degree and sentences of death, resulting from a two count indictment. Our jurisdiction vests under Article V, section 3(b)(1), Florida Constitution (1972).

On the evening of March 4, 1974, at approximately 11:00 p. m., the appellant Jacobs and three companions, his wife, Theresa Collins, and Elisha Chavis, went to Ed's Country Store in Pasco County intending to rob the store. En route the entire group consumed an undetermined amount of intoxicating beverages.

Upon arriving at the store, Jacobs and Chavis went inside while Jacobs' wife went to the restroom. Collins remained outside near the car. While the robbery was in progress, the caretaker of the store, Grant Isen, reached into his pocket and Jacobs shot and killed him for fear that Isen had a gun. Seconds afterward, Chavis shot and killed the sole other occupant of the store, Barry Marsh, when Marsh approached Jacobs with a large knife. Jacobs and Chavis then left the store taking with them an unspecified amount of beer, cigarettes, and money, which was later divided among the group.

Approximately eight months after the robbery, Jacobs' wife went to Massachusetts where she gave a statement to Lieutenant Richard Coughlin of the Massachusetts State Police setting forth the details of the offense. This information was transmitted to the Pasco County Sheriff's Department and resulted in the arrest of Jacobs, Chavis, and Collins. An indictment was returned charging Jacobs with the two murders. Jacobs was tried and convicted of first degree murder on both counts. He was sentenced to death on each count.

On this appeal Jacobs raises five points as error.

First, Jacobs argues that it was reversible error for the trial judge to refuse to instruct the jury that intoxication may negate the specific intent required to establish the commission of the crimes. In the usual case, to be guilty of first degree murder the defendant must not only intend to kill another human being, but in addition the state must prove that the homicide was perpetrated from a premeditated design. In such case intoxication may make the killer incapable of the reflection called for by the requirement of premeditation. But this case is not the usual case of premeditated murder; this case involves application of the felony murder doctrine.

[1, 2] In cases of felony murder the mental element of the offense is that which is required for the felony; premeditation is supplied by the felony. *Adams v. State*, 341 So.2d 765 (Fla.1976). Thus a defendant charged with first degree felony murder on account of a killing during the commission of a robbery may defend himself on the ground that he was too intoxicated to entertain the intent to rob.

[3] Jury instructions regarding intoxication, however, need not be given in every case in which evidence has been adduced at trial that the defendant consumed alcoholic beverages prior to the commission of the offense. *Shaw v. State*, 229 So.2d 619 (Fla. 2d DCA 1969). There was evidence that Jacobs had used intoxicating beverages, but there was no evidence that Jacobs was intoxicated. There is no evidence as to the amount of alcohol consumed during the several hours Jacobs drove around prior to the robbery.

[4] In this case the record reveals that the trial judge did not commit reversible error in denying the requested jury instructions. The accomplices' testimony shows that the robbery was carried out from a preconceived plan and, until the shooting erupted, it was successful. Also, the evidence clearly shows that defendant was capable of reflection at the time of the homicides and premeditation was thus proved. This being so, the felony murder evidence was merely cumulative to show premeditation.

Jacobs' second point on appeal is that the 180-day speedy trial rule was violated. Jacobs was taken into custody on November

17, 1975. On February 26, 1975, he filed a motion to suppress certain evidence, which was granted on March 17, 1975. On March 19, 1975, the state sought, and the trial court granted, a continuance to take an interlocutory appeal of the suppression order. Fla.R.Crim.P. 3.191. Successive motions for extensions of time were granted to the state by the trial judge, including a June 11, 1975, extension for a reasonable period of time after the appellate court filed its opinion in the interlocutory appeal. The mandate of the appellate court reversing and remanding the trial court's order granting the motion to suppress was received by the trial court on November 6, 1975. Jacobs was brought to trial on February 10, 1976.

Jacobs argues that the trial court's initial extension of time was for 90 days and that, because the subsequent extensions were outside the trial court's jurisdiction during the appeal, the speedy trial rule was violated.

[1] Jacobs is in error. A review of the record reveals that the initial extension of time was not limited to a time certain. The extension was for a reasonable time in which the state could expeditiously pursue the interlocutory appeal. The additional extensions of time were effective because only the trial court, not the appellate court, may grant an extension of the speedy trial time period while an interlocutory appeal is pending. *Blair v. Barnett*, 288 So.2d 511 (Fla.1973).

[2-4] The June 11, 1975, order of the trial court validly extended the time until a reasonable period after the appellate court filed its opinion. As we stated in *State v. Jenkins*, 288 So.2d 971, 974 (Fla.1980), "[I]f the trial court grants an extension for the period of the appeal plus a reasonable period after issuance of the appellate mandate without specifying the number of days, the time period under rule 3.191(a) is not controlling, and only the constitutional test of reasonableness o[illegible]" In the absence of these time limitations, the question of whether a trial date affords defendant a speedy trial must be determined in the light of the circumstances of the particular case as a matter of judicial discretion. The mere lapse of time before trial is not the only factor to be considered under such circumstances. This was the reasoning in *State ex rel. Butler v. Cullen*, 253 So.2d 681 (Fla. 1971), where defendant sought a continuance. This rule is equally applicable when the state seeks a continuance. *See King v. State*, 308 So.2d 209 (Fla. 3d DCA 1975).

[5] Jacobs' third point on appeal is that one of the members of the grand jury which indicted him was not a qualified elector on the date the indictment was returned, and the indictment is therefore unlawful. The appellant made a timely motion to dismiss the indictment, which was denied, thereby preserving this point for appeal.

Section 40.01, Florida Statutes (1975), provides inter alia that grand jurors "shall be taken from the male and female persons over age of twenty-one years, who are fully qualified electors of the respective counties." (Emphasis supplied). The challenged grand juror, although a qualified elector at the time her name was placed on the jury list, was purged from the voter list prior to Jacobs' indictment. Jacobs argues that the participation of the grand juror voids his indictment, citing the case of *Kimmel v. State*, 9 Fla. 9 (1860), where a grand juror who was determined not to be qualified because over the age of sixty at the time he was summoned for jury duty, rendered the indictment void.

The applicable statute, section 40.01, Florida Statutes (1975), merely requires that the names placed on the jury list "shall be taken" from the voting list. *Johnson v. State*, 288 So.2d 71 (Fla.1974). The statute does not mandate that the grand juror be on the voting list when an indictment is returned. Appellant's third point is therefore without merit. *See also Reed v. State*, 291 So.2d 7 (Fla.1974); *Jones v. State*, 290 So.2d 560 (Fla.1974).

[16] Jacobs' fourth point on appeal is that the imposition of the death penalty in this case would be a denial of equal protection. The Florida statute reflecting capital

punishment has been held constitutional. *Proffitt v. State*, 315 So.2d 461 (Fla.1975), *aff'd, Proffitt v. Florida*, 482 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Jacobs says, however, that the death penalty is unconstitutionally imposed when a co-defendant on similar facts is not sentenced to death. He cites *Slater v. State*, 316 So.2d 539 (Fla.1975), where we held that the imposition of the death penalty against a defendant convicted a first degree felony murder was unconstitutionally applied where the defendant had been an accomplice and the "trigger man", who had entered a plea of guilty, was sentenced to life imprisonment.

We are not confronted with the situation in which the "trigger man" was sentenced to life and the accomplice improperly sentenced to death, *Slater v. State*, *supra*, nor are we confronted with the situation where the accomplice is sentenced to life and the "trigger man" properly sentenced to death, *Meeks v. State*, 339 So.2d 186 (Fla.1976). Instead, we are confronted with the situation in which there are two "trigger men", one (Chavis), who pleads guilty to second degree murder and is sentenced to life imprisonment, and another (Jacobs), who is convicted of first degree murder in a jury trial and is sentenced to death.

Essentially, appellant's argument is that in case of felony murder invoiving two "trigger men" it is constitutionally impermissible to allow one "trigger man" to plead guilty and be sentenced to life imprisonment, and allow the second "trigger man" to exercise his right to a jury trial and take his chances that a conviction and death sentence will result. We do not accept appellant's argument. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 2927, 49 L.Ed.2d 859, 889, n. 50 (1976).

In a related point, Jacobs argues that the trial judge committed reversible error in denying the defendant the right to inform the jury of the sentences imposed on Jacobs' accomplices. He cites *Messer v. State*, 330 So.2d 137 (Fla.1976), where we remanded to the trial court for the purpose of conducting another sentencing hearing because the trial judge had erroneously refused to permit the defendant to inform the jury at the sentencing phase of the sentences imposed on the defendant's accomplices and of certain psychiatric testimony concerning the defendant.

[11-13] The case *sub judice* is quite different. Jacobs was precluded from informing the jury of the sentences imposed on his accomplices at *closing argument*; he made no attempt to present this evidence at the sentencing hearing. *Messer* stands for the proposition that evidence of the sentences imposed on the defendant's accomplices should not be withheld from the jury at the sentencing phase. § 912.141, Fla.Stat. (1975). Clearly, the jury should be allowed to weigh all the facts and circumstances surrounding the homicide, so that their advisory verdict will be the result of reasoned judgment rather than an exercise in discretion. *Raulerson v. State*, 358 So.2d 826 (Fla.1978). But this does not mean that evidence which is admissible at the sentencing hearing is also admissible at trial. Nor does this mean that the state or the trial judge must provide the jury with such information if the defendant fails to do so; generally, it is improper for the state to disclose that another defendant has been convicted. *Thomas v. State*, 202 So.2d 903 (Fla. 3d DCA 1967). While it is clear that the legislature in the enactment of section 921.141, Florida Statutes (1975), sought to extend the admissibility of evidence at the sentencing hearing, it did not grant the defendant or the state any greater latitude at the trial phase of the bifurcated proceeding.

As for appellant's final point on appeal, we have reviewed the record and determined that it is without merit.

[14] It is our responsibility to review the judgment and sentence imposed upon defendant in light of other decisions and determine whether the punishment is too great. The following findings in aggravation and mitigation were made by the trial court:

FINDING IN SUPPORT OF DEATH SENTENCE

"On February 13, 1976, a majority of the jury recommended in favor of the death penalty for the Defendant; this Court, after considering the recommendation of the jury, and after weighing the aggravating and mitigating circumstances, as contained in Florida Statute 921.141, sentenced the Defendant to death on each of the two counts as contained in the indictment filed in the above-styled cause and in so doing found as follows:

1. The Defendant committed or aided in the committing of these acts of murder while engaged in the commission of the crime of robbery upon the victims of the murder. The testimony of the three State witnesses, Paula Jacobs, Thomas Collins, and Jean Gray, indicated that the purpose of the Defendant being at the store was to commit a robbery, and that these murders were committed in furtherance of that motive.

2. This capital felony was committed in part for the purpose of avoiding or preventing the arrest or detection of the Defendant for the perpetration of the robbery. The State witness, Jean Gray, testified that the Defendant had made the statement to her that he never left any witnesses and that those that he did leave never "talked." The evidence further disclosed that the participants in the robbery indicated prior to entering the subject store that the witnesses (i. e. ultimate victims) could not be left alive to identify the Defendant Jacobs or others.

3. These acts of murder were committed by the Defendant for pecuniary gain. The testimony of Paula Jacobs and Thomas Collins shows that from the very outset of the sequence of events which led to the deaths of Grant Ison and Barry Marsh, the Defendant and others were together for the sole purpose of committing a larceny.

4. This capital felony was especially heinous, atrocious, and cruel in that the testimony of Paula Jacobs, during the guilt phase of the trial, revealed that the Defendant started to her immediately following the shooting that after he shot the man behind the cash register, his victim begged the Defendant not to shoot again. Paula Jacobs further testified that the Defendant told her that he had started shooting and was not going to stop. Further, the testimony of the medical examiner shows that the man whose body was found behind the cash register had not died instantly, but was, in fact, alive for as much as an hour after he had been shot three times. Testimony of the medical examiner further indicated that the second victim had been shot a total of six times.

The only mitigating circumstances which this Court finds to exist is that the Defendant has no significant history of prior criminal activity. This Court feels that there are no other existing mitigating circumstances, and that additionally, the evidence as presented during the guilt phase of the trial specifically negates all but the aforementioned mitigating circumstances found in Florida Statute 921.141(6).

WHEREFORE, this Court, upon weighing the aforementioned aggravating and mitigating circumstances, does, therefore, accept the advisory opinion rendered in this cause by the jury of twelve persons and hereby finds that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Finding 1 lists the aggravating circumstance of murder while engaged in the crime of robbery while Finding 3 includes the aggravated circumstance of murder for pecuniary gain. These are overlapping and constitute only one aggravating circumstance. *Provence v. State*, 337 So.2d 783 (Fla.1976), was an appeal from a judgment of first degree murder and sentence to death. At the sentencing hearing the jury rendered an advisory verdict recommending life. The trial judge considered as factors in aggravation that there were two armed robbery charges pending against defendant

in another state and that, according to the presentence investigation, defendant was at the time of his arrest engaged in ripping off a heroin addict. We held that the court erred in considering mere arrest and accusation as factors in aggravation. In this opinion we said:

> The judge's order does not specifically enumerate which aggravating circumstances under Section 921.141(5), Florida Statutes, induced him to override the jury's recommendation of mercy and to sentence Provence to die. The State argues the existence of two aggravating circumstances that the murder occurred in the commission of the robbery [subsection (d)] and that the crime was committed for pecuniary gain [subsection (f)]. While we would agree that in some cases, such as where a larceny is committed in the course of a rape-murder, subsections (d) and (f) refer to separate analytical concepts and can validly be considered to constitute two circumstances, here, as in all robbery-murders, both subsections refer to the *same aspect* of the defendant's crime. *Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged.* Mindful that our decision in death penalty cases must result from more than a simple summing of aggravating and mitigating circumstances, *State v. Dixon*, 283 So.2d 1, 10 (Fla.1973), we believe that Provence's pecuniary motive at the time of the murder constitutes only one factor which we m ... onsider in this case.

337 So.2d at 786. (Emphasis supplied).

In the case *sub judice* Finding 1, relating to the robbery, and Finding 3, relating to murder for pecuniary gain, constitute but one aggravating circumstance. In *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973), we said:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla. Statutes, Section 921.141(7), F.S.A. All evidence of mitigating circumstances may be considered by the judge or jury.

[18] It is necessary that the trial judge exercise a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances. The trial judge reasoned that a murder committed for pecuniary gain during the course of a robbery coupled with the heinous manner in which death was inflicted, as well as the circumstance that death was inflicted for the purpose of avoiding detection, required the imposition of a death sentence. The fact that these factual situations were considered as four aggravating circumstances instead of three does not indicate that the technical error committed by the judge in any way affected his reasoned judgment.

The case *sub judice* involves the listing of one aggravating circumstance in such a manner that the factual situation became two aggravating circumstances. *Elledge v. State*, 346 So.2d 998 (Fla.1977), involved an entirely different situation. Defendant Elledge was convicted and sentenced to death for the murder of Strack. The homicide occurred on a Saturday afternoon. On Sunday afternoon defendant Elledge murdered Gaffney. On Monday morning defendant murdered Nelson. The court held that admission of evidence of the Gaffney murder at the sentence hearing was improper because there had been no conviction of the defendant for this homicide. Evidence of the Nelson murder was appropriate because defendant had been convicted of this homicide. This Court reasoned that consideration of the Gaffney homicide could have influenced the judge in his reasoned judgment and therefore, defendant should be granted a new sentencing trial. In the case *sub judice* the trial court's reasoned judgment in imposing the death sentence could not have been influenced by an inappropriate factual situation. *Elledge*, *supra*, is not controlling.

We have carefully reviewed the record in this case and it is our opinion that the aggravating and mitigating circumstances are such that the infliction of capital punishment is warranted.

Finding no error, it is our opinion that the judgments and sentences should be and they are hereby affirmed.

It is so ordered.

BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

SUNDBERG, C. J., and ENGLAND, J., concur in affirmance of the convictions of guilt, but dissent from affirmance of the death sentences. Because of violation of the principles announced in *Provence v. State*, 337 So.2d 783 (Fla.1976) and *Elledge v. State*, 346 So.2d 998 (Fla.1977), they would remand to the trial judge for resentencing.

Supreme Court of Florida

THURSDAY, JUNE 14, 1984

ALIGAAH ARDALLE JACOBS,	*	
Petitioner,	*	
v.	*	CASE NO. 62,595
LOUIE L. WAINWRIGHT, etc.,	*	
Respondent.	*	

Upon consideration of the Motion for Rehearing filed in the above cause by attorneys for petitioner,

IT IS ORDERED that said Motion be and the same is hereby denied.

ALDERMAN, C.J., ADKINS, BOYD, EHRLICH and SHAW, JJ., concur
OVERTON and McDONALD, JJ., dissent

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: _____
Deputy Clerk

TC
cc: Patrick D. Doherty, Esquire
Robert E. Gerber, Esquire
Mary Gilmore, Esquire
Amy Bard, Esquire
James H. Dysart, Esquire

OPPOSITION BRIEF

ORIGINAL

NO. 84-5389

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ELIGAAH ARDALLE JACOBS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT
Secretary, Department of Corrections
State of Florida,

Respondent.

On WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

The State of Florida has a legitimate interest in maintaining the integrity of its procedural rule which requires that a proffer be made in order to preserve for review the exclusion of evidence. In the instant case Petitioner has failed to demonstrate any abuse by the Supreme Court of Florida in its insistance on compliance with the State's proffer rule. Since the Florida Supreme Court's decision rested upon an independent and adequate State procedural ground, review by the United States Supreme Court of the federal constitutional issue raised by Petitioner is precluded.

The Florida Supreme Court's decision in the instant case not to remand for resentencing was consistent with this Court's decision in Wainwright v. Goode, __U.S.__, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983).

ARGUMENT

ISSUE I.

THE FLORIDA SUPREME COURT'S DECISION IN THE INSTANT CASE THAT PETITIONER'S APPELLATE COUNSEL CANNOT BE CONSIDERED INCOMPETENT FOR FAILING TO RAISE A FEDERAL CONSTITUTIONAL ISSUE WHICH HE WAS PROCEDURALLY PRECLUDED FROM RAISING RESTED UPON AN INDEPENDENT AND ADEQUATE STATE PROCEDURAL GROUND, AND THE STATE OF FLORIDA'S INSISTENCE ON COMPLIANCE WITH ITS PROCEDURAL RULE SERVES A LEGITIMATE STATE INTEREST SO AS TO PRECLUDE REVIEW BY THE UNITED STATES SUPREME COURT OF THE FEDERAL CONSTITUTIONAL ISSUE IN QUESTION.

This Court said in Henry v. Mississippi, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 at 412-413, reh. den. 380 U.S. 926, 85 S.Ct. 878, 13 L.Ed.2d 813 (1965)(Citations omitted):

> It is, of course, a familiar principle that this Court will decline to review state court judgments which rests on independent and adequate state grounds, even where those judgments also decide federal questions. The principle applies not only in cases involving state substantive grounds, but also in cases involving procedural state grounds.
>
> ...A procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional

> grounds, prevents implementation of the federal right. Accordingly, we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question.
>
> * * *
>
> ...[A] litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest.

In the instant case, the Supreme Court of Florida insisted on compliance with a long-standing state procedural rule. The court said:

> Jacobs first alleges that his appellate counsel erred in failing to argue that the trial court's exclusion of nonstatutory mitigating factors at sentencing was error. There was no proffer of the attempted testimony after the trial judge excluded it. The purpose of a proffer is to put into the record testimony which is excluded from the jury so that an appellate court can consider the admissibility of the excluded testimony. Reversible error cannot be predicated on conjecture. Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976); See Singer v. State, 109 So.2d 7 (Fla. 1959). Jacob's appellate counsel failed to raise an issue which he was procedurally precluded from raising and cannot be considered incompetent for doing so. Jacobs v. Wainwright, 450 So.2d 200 (Fla. 1984).

Without question the State of Florida has a legitimate interest in maintaining the integrity of its procedural rule which requires that a proffer be made in order to preserve for review the exclusion of evidence. This rule is akin to the "contemporaneous objection" rule which was recognized by this Court as deserving respect in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Many of the justifications for the "contemporaneous objection" rule noted by the Court in Sykes also apply to the proffer rule recognized by Florida and other jurisdictions.

Reversible error should never be predicated on conjecture. In the instant case, it is not known what evidence, if any,

Petitioner would have offered as to mitigation. And it cannot be known whether the evidence he might have offered would be relevant or sufficient to establish any mitigating circumstances. This problem would not exist if a proffer had been made by Petitioner's trial counsel. If a proffer had been made, the Supreme Court of Florida would have been able to determine if there had been any actual prejudice to Petitioner by the trial court's ruling. Without a proffer having been made, the Florida Supreme Court was necessarily in the dark as to whether there had been any actual prejudice to Petitioner.[1/]

Petitioner maintains that the Florida Supreme Court misapplied Florida's proffer rule in this case. He cites Section 90.104, Florida Statutes (1983) which provides in pertinent part:

> (1) A court may predicate error, set aside or reverse a judgment, or grant a new trial on the basis of admitted or excluded evidence when a substantial right of the party is adversely affected and:
>
> ...(b) When the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked.

Petitioner claims that the substance of the evidence excluded by the trial court in the instant case was apparent from the context within which the questions were asked. He asserts that the substance of the evidence was "that of nonstatutory

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1/ On page 149 of the Appendix to the instant petition is a chart devised by Petitioner which lists mitigating circumstances Petitioner alleges would have come before the trial court in a proper sentencing process. Petitioner's chart constitutes, in effect, an after-the-fact speculative proffer by appellate counsel. However, these speculative mitigating circumstances are DEHORS the record and could not properly be considered by the Supreme Court of Florida.

mitigating factors." However, the fact that Petitioner might have attempted to present evidence of nonstatutory mitigating factors to the trial court could be of no real importance to the Florida Supreme Court. The court needed to know the substance of the nonstatutory mitigating factors that were not presented in order to determine whether there had been any actual prejudice to Petitioner and to avoid reversal predicated on conjecture.

The Florida Supreme Court has the responsibility to interpret Florida's procedural rules and decide the circumstances in which a proffer must be made. The court decided that in the instant case the circumstances were such that a proffer needed to have been made by trial counsel to preserve for review the excluded evidence. This holding by the Florida Court constitutes the law of the state concerning the application of the proffer rule. The holding is not clearly arbitrary or erroneous, and there are no decisions by the Supreme Court of Florida which are in conflict with the holding. Consequently, it cannot be said that the Florida Court has misapplied Florida law.

Petitioner further contends that the Florida Supreme Court could have granted relief to him under its doctrine of "fundamental error." He urges that "In the capital sentencing context a Lockett violation would be as fundamental as one could get." Petitioner argued this point in his motion for rehearing below.

In denying Petitioner's Motion for Rehearing, the Florida Supreme Court obviously rejected Petitioner's argument. The Court's decision is consistent with its decisions in related contexts. For example, in Songer v. State, 419 So.2d 1044 (Fla. 1982), the appellant complained that at sentencing the court failed to instruct the jury that the state had the burden of proving beyond a reasonable doubt that the death penalty was appropriate. He contended that the jurors were given the

impression that there was a presumption of aggravating circumstances and that appellant had to prove that he was worthy of mercy. The appellant did not raise this issue on direct appeal, but asserted that the Florida Supreme Court could nevertheless consider it because an issue of fundamental error may be raised at any time. The Florida Supreme Court did not agree that the trial cour had fundamentally erred and did not find it necessary to consider Songer's claim.

The Supreme Court of Florida does not apply its "fundamental error" doctrine to errors in the abstract. The court applies the doctrine only to errors affecting substantial rights which produce actual and serious prejudice. In discussing fundamental error the court in State v. Smith, 240 So.2d 807 (Fla. 1970) quoted with approval the following passage:

> The Florida cases are extremely wary in permitting the fundamental error rule to be the 'open sesame' for consideration of alleged trial errors not properly preserved. Instances where the rule has been permitted by the appellate Courts to apply seem to be categorized into three classes of cases: (1) where an involved statute is alleged to be unconstitutional, (2) where the issue reaches down into the very legality of the trial itself to the extent that a verdict could not have been obtained without the assistance of the error alleged, and (3) where a serious question exists as to jurisdiction of the trial Court.

The court continued:

> This Court has recognized that every constitutional issue does not amount to fundamental error cognizable initially upon appeal, saying:
>
> "Constitutional issues, other than those constituting fundamental error, are waived unless they are timely raised."
>
> "'Fundamental error,' which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action. The Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly." Sanford v. Rubine, 237 So.2d 134, 137 (Fla. 1970).

In Williams v. State, 400 So.2d 542 (Fla. 3d DCA 1981), the appellate court said:

> We find that the strong disinclination which the courts have demonstrated toward setting aside convictions for trial errors which were not prejudicial to the Defendant extends to include failures to instruct specifically as to essential elements of crimes. Such failures to instruct have been measured by the same standards we ourselves have used when examining for manifest error —the presence or absence of serious prejudice.

Since the Florida courts do not apply the fundamental error doctrine except in rare cases involving errors which affect substantial rights and produce actual and serious prejudice, the Supreme Court of Florida was not required to apply the doctrine in the instant case and cannot be faulted for not doing so.

Petitioner states in his petition that "the Florida Supreme Court has repeatedly held that it can review any issue concerning the sentencing trial in a capital case, even though that issue has not been raised by the parties or objected to at trial." While it may be true that in a particular case the failure to object was not fatal to appellate consideration of an issue, nevertheless the Florida Supreme Court does not predicate reversible error on conjecture. In all of the cases cited by Petitioner in connection with this argument, the Florida Court had sufficient facts before it to reach a conclusion as to whether there had been *any* actual prejudice to the defendant due to trial court error. In the instant case, there were no facts for the court to consider as to whether Petitioner suffered any actual prejudice.

Finally, Petitioner asserts that "the Florida Supreme Court had the power to review the Lockett violation under the substantial body of Florida law that to preserve points for appeal, counsel need not engage in futile acts after the trial court has already ruled on an issue." Yet an examination of all of the cases cited by Petitioner in this connection discloses that in each case the substance or significance of the excluded material was apparent. The reviewing

court was able to discern the actual prejudice that accrued to the complaining party. This distinguishes those cases from the instant case in which no actual prejudice could be discerned.

In summary, Florida has a substantial and legitimate interest in preserving the integrity of its proffer rule. Petitioner has demonstrated no abuse by the Supreme Court of Florida in its insistence on compliance with the rule. Review by this Court of the federal constitutional issue in question is, therefore, precluded.

ISSUE II.

THE FLORIDA SUPREME COURT'S DECISION IN THE INSTANT CASE NOT TO REMAND FOR RESENTENCING, WHERE A MITIGATING FACTOR WAS FOUND TO EXIST AND AN AGGRAVATING FACTOR WAS INVALIDATED ON APPEAL, DID NOT VIOLATE DUE PROCESS OR THE EIGHTH AMENDMENT TO THE CONSTITUTION.

Wainwright v. Goode, __U.S.__, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983), is controlling as to this issue. In Goode the trial judge found that three statutory aggravating circumstances had been proved beyond a reasonable doubt. He also found two mitigating circumstances but determined that they did not outweigh the aggravating circumstances. He concluded that Goode should be sentenced to death.

The Court of Appeals for the Eleventh Circuit subsequently concluded that the trial judge had relied upon Goode's "future dangerousness" as an aggravating circumstance which is impermissible under Florida law. The Court of Appeals then reasoned that execution of Goode would be a "unique, freakish instance," because he "would have been executed in reliance upon the recurrence factor, when all others in Florida have not been, and, pursuant to the law established in Miller [v. State, 373 So.2d 882 (Fla. 1979)], cannot be in the future." The court concluded that such an "arbitrary and capricious manner" of execution cannot be countenanced under the Eighth Amendment.

In reversing the Eleventh Circuit this Court said:

> Even if the Court of Appeals had been correct in concluding that the sentencing judge had relied on a factor unavailable to him under state law, it erred in reversing the district court's dismissal of Goode's habeas petition.
>
> Although recognizing that a state is free to enact a system of capital sentencing in which a defendant's future dangerousness is considered, the Court of Appeals believed that the Florida court's failure to follow Florida law constituted a violation of the Eighth and Fourteenth Amendments because it would result in an "arbitrary" and "freakish" execution. 704 F.2d, at 610.
>
> In Barclay v. Florida, __U.S.__, 77 L.Ed.2d 1134, 103 S.Ct. 3418 (1983), the Court upheld a death sentence despite the reliance by the trial court on an aggravating circumstance that was improper under state law. The plurality stated that "mere errors of state law are not the concern of this Court, Gryger v. Burke, 334 U.S. 728, 731, [92 L.Ed. 1683, 68 S.Ct. 1256] (1948), unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution." __U.S., at __, 77 L.Ed.2d 1134, 103 S.Ct. 3418. The critical question "is whether the trial judge's consideration of this improper aggravating circumstance so infects the balancing process created by the Florida statute that it is constitutionally impermissible for the Florida Supreme Court to let the sentence stand." Id., at __, 77 L.Ed.2d 1134, 103 S.Ct. 3418.
>
> We have great difficulty concluding that the balancing process was so infected. A properly instructed jury recommended a death sentence. On direct appeal to the Florida Supreme Court, the court stated that "comparing the aggravating and mitigating circumstances with those shown in other capital cases and weighing the evidence in the case sub judice, our judgment is that death is the proper sentence." Goode v State, 365 So.2d 381, 384-385 (1979). Whatever may have been true of the sentencing judge, there is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered Goode's future dangerousness. Consequently, there is no sound basis for concluding that the procedures followed by the State produced an arbitrary or freakish sentence forbidden by the Eighth Amendment.

In the instant case, the Supreme Court of Florida reached the conclusion that the trial judge's reasoned judgment in imposing the death sentence could not have been influenced by an inappropriate factual situation. The court said:

> It is necessary that the trial judge exercise a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances. The trial judge reasoned that a murder committed for pecuniary gain during the course of a robbery coupled with the heinous manner in which death was inflicted, as well as the circumstance that death was inflicted for the purpose of avoiding detection, required the imposition of a death sentence. The fact that these factual situations were considered as four aggravating circumstances instead of three does not indicate that the technical error committed by the judge in any way affected his reasoned judgment.
>
> The case sub judice involves the listing of one aggravating circumstance in such a manner that the factual situation became two aggravating circumstances. Elledge v. State, 346 So.2d 998 (Fla. 1977), involved an entirely different situation. Defendant Elledge was convicted and sentenced to death for the murder of Strack. The homicide occurred on a Saturday afternoon. On Sunday afternoon defendant Elledge murdered Gaffney. On Monday morning defendant murdered Nelson. The court held that admission of evidence of the Gaffney murder at the sentence hearing was improper because there had been no conviction of the defendant for this homicide. Evidence of the Nelson murder was appropriate because defendant had been convicted of this homicide. This Court reasoned that consideration of the Gaffney homicide could have influenced the judge in his reasoned judgment and therefore, defendant should be granted a new sentencing trial. In the case sub judice the trial court's reasoned judgment in imposing the death sentence could not have been influenced by an inappropriate factual situation. Elledge, supra, is not controlling.
>
> We have carefully reviewed the record in this case and it is our opinion that the aggravating and mitigating circumstances are such that the infliction of capital punishment is warranted.
> Jacobs v. State, 396 So.2d 1113 (Fla. 1981).

In Jacobs, supra, the trial judge's consideration of an improper aggravating circumstance did not so infect the balancing process created by the Florida statute that it was constitutionally impermissible for the Florida Supreme Court to let the sentence stand. And as this Court said in Barclay v. Florida, __U.S.__, 103 S.Ct. 3418, 77 L.Ed.2d 1134 at 1149 (1983):

> There is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance.

CONCLUSION

Based on the foregoing facts, arguments and authorities, Respondent submits that Petitioner has failed to demonstrate a violation of his constitutional rights or a misapplication of precedent from this Court which would entitle him to relief from this Court. Respondent respectfully requests that the instant Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert E. Gerber at Fried, Frank, Harris, Shriver & Jacobson, One New York Plaza, New York, New York 10004, this 11th day of October, 1984. All parties required to be served have been served.

OF COUNSEL FOR RESPONDENT

OPINION

SUPREME COURT OF THE UNITED STATES

ELIGAAH ARDALLE JACOBS *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 84-5389. Decided November 26, 1984

The petition for writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

This Court has unequivocally stated that a sentencer in a capital case must be permitted to consider, as evidence of mitigation, any aspect of a defendant's character or record, and any circumstances of the offense, that the defendant offers as a basis for a sentence less than death. *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978). The issue squarely presented is whether, when a trial judge has prevented the jury from hearing indisputably relevant mitigating evidence, that error creates such an unacceptable risk that the death penalty was inappropriately imposed as to require a reviewing court to remand for resentencing, even if the error was not properly preserved in the trial court. To hold that the fundamental error may be ignored is to penalize a defendant, possibly with his life, for the shortcomings of his attorney. I do not believe such a result comports with the most elemental principles underlying the Eighth and Fourteenth Amendments. I therefore dissent.

I

The relevant facts of this case are quite straightforward. The defendant took the stand at the sentencing phase of his trial and testified about certain statutory mitigating factors. Trial counsel then asked: "Do you know anything else that

you wish to tell this jury in mitigation of this offense of which you have been convicted?" The prosecutor objected to this question, arguing that it was too broad because "it must follow the statute." Trial counsel tried to phrase the question differently, and again the objection was sustained. The trial court accepted the prosecution argument that the Florida death penalty statute permitted only evidence of statutory mitigating factors. Since, under this view, *all* evidence of *nonstatutory* mitigating factors was inadmissible, the trial judge did not permit the defendant to describe to the jury the mitigating circumstances of his background, and of the offense.

There is no dispute that the trial judge violated the mandate of *Lockett* v. *Ohio* when he ruled that evidence of nonstatutory mitigating factors was not admissible. However, defendant's trial counsel, who continued as appellate counsel, did not raise this issue either on direct appeal in the state courts, or in the first petition for certiorari filed with this Court.

Thereafter the defendant obtained new counsel, who filed a petition for habeas corpus in the Florida Supreme Court, which has original jurisdiction to address claims of ineffective assistance of counsel before that court. In a terse paragraph, the court dismissed the argument that appellate counsel was ineffective. The court ruled that appellate counsel could not be considered incompetent for failure to raise the claim on appeal because he was procedurally precluded from raising it. Under Florida law, the court explained, counsel was required to make a proffer of the attempted testimony after the trial judge excluded it. Thus, the court effectively ruled, there could have been no prejudice from the failure to raise the issue on appeal, since the court would not have addressed it anyway. Two justices dissented on the grounds that the nature of the excluded evidence was apparent, that the court should have addressed the claim, and that appellate counsel was ineffective in his failure to raise the issue. The

defendant then filed this petition for certiorari, challenging the State Supreme Court's ruling that the reviewing court would have had no obligation to address the *Lockett* claim on the merits.

II

Because of the basic difference between the death penalty and all other punishments, this Court often has recognized that there is a corresponding difference in the need for reliability in determining whether the death sentence is appropriately imposed in a particular case. Thus, we have recognized that "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine," *Jurek* v. *Texas*, 428 U. S. 262, 276 (1976) (opinion of Stewart, POWELL and STEVENS, JJ.), and we have steadfastly insisted that the sentencer in capital cases must be permitted to consider any relevant mitigating factor. *Eddings* v. *Oklahoma*, 455 U. S. 104, 112 (1982).

The premise of this unfolding doctrine is that a sentence imposed without evidence of facts and circumstances offered in mitigation creates a risk that the death penalty will be imposed in spite of factors that call for a different penalty. As THE CHIEF JUSTICE has written: "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett* v. *Ohio*, *supra*, at 605. Yet, when a court closes its eyes to clear *Lockett* error, as the state court did in this case, and instead rests on technical procedural rules, it accepts the risk to which THE CHIEF JUSTICE refers and comes down on the side of death.

Nor does THE CHIEF JUSTICE stand alone in his recognition that a sentencing body's failure to consider all mitigating evidence seriously and unacceptably raises the possibility that a person will die in error. Infusing many opinions from this Court is the sense that *Lockett* is so fundamental, and the result of an improper exclusion of mitigating evidence poten-

tially of such great magnitude, that such errors simply must be corrected. Thus, writing in *Eddings* v. *Oklahoma*, JUSTICE O'CONNOR observed: "Because the trial court's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing." 455 U. S., at 117, n. (O'CONNOR, J., concurring). Indeed, in *Eddings* five Members of this Court reversed a death sentence as a consequence of a *Lockett* violation, even though certiorari had been granted on a separate issue, and even though the claim was presented neither to the state court nor to this Court. Similarly, writing in *Strickland* v. *Washington*, 466 U. S. —— (1984), JUSTICE BRENNAN echoed this sentiment when he observed that "a sentencing judge's failure to consider relevant aspects of a defendant's character and background creates such an unacceptable risk that the death penalty was unconstitutionally imposed that, even in cases where the matter was not raised below, the 'interests of justice' may impose on reviewing courts 'a duty to remand [the] case for resentencing.' *Id.*, at —— (BRENNAN, J., concurring in part and dissenting in part). To my mind, the concerns expressed in these opinions all point toward one irrefutable conclusion: that regardless of procedural obstacles, where the trial court's commission of clear *Lockett* error leads to the exclusion of relevant mitigating evidence, the reviewing court must address the issue and remand for resentencing.

The court reviewing the defendant's sentence would have had precisely such a duty to remand this case for resentencing, had counsel either raised the *Lockett* issue before that court, or had the court noted it of its own account. Indeed, the need to consider the claim, and remand, is particularly compelling when the trial court has blocked the defendant's submission of *all* nonstatutory mitigating factors. The State Supreme Court's willingness to blink at such potentially profound and consequential error, as evidenced by its cursory dismissal of the ineffective-assistance claim on the ground

that the error would not have been addressed anyway, jeopardizes what I believe to be the foundation on which this Court's current death penalty jurisprudence rests. And, as I have noted, this concern is especially palpable under the facts of this case. The defendant has indicated that if he had been permitted to testify, he would have told the jury that his coparticipants were not sentenced to death; that the victim drew a gun on him; and that he came from a background of extreme poverty, had worked steadily since childhood, and had a long history of concern for family and friends. Such testimony is paradigmatic of the evidence whose admission is fostered and protected by *Lockett* and *Eddings*, and yet it was excluded here.

This case therefore offers a compelling opportunity to consider whether a reviewing court, confronted with the erroneous exclusion of undeniably relevant mitigating evidence, must consider the claim regardless of procedural rules permitting the court to avoid the merits. It offers an opportunity to consider whether the shortcomings of an attorney, appointed to handle a case both at trial and on appeal, will be permitted to take their toll on the life of a defendant. I cannot imagine that the Constitution countenances such an inhumane result. Accordingly, I dissent.

III

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman* v. *Georgia*, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring). Even if I did not believe that the death penalty is in all cases unconstitutional, however, I would grant certiorari in this case for the reasons set out above.